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No. 93-1578

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

THE DIOCESE OF COLORADO, A COLORADO CORPORATION, and BISHOP WILLIAM FREY,
*Petitioners,*

v.

MARY E. MOSES, n/k/a MARY ELAINE TENANTRY,
*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of Colorado**

## REPLY BRIEF FOR PETITIONERS

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Respondent's efforts to explain or justify the Colorado Supreme Court's refusal to apply the Religious Freedom Restoration Act (RFRA) in this case are unavailing. Her claim that the Act, if applied, would not have made a difference in the outcome reflects a misreading of both the Colorado Supreme Court's opinion and the substantive requirements of the Act. And respondent is equally incorrect when she asserts, based on her analysis of the statutory language and this Court's recent decision in *Landgraf v. U.S.I. Film Prods.*, 62 U.S.L.W. 4255 (April 26, 1994) (No. 92-757), that it is plain that the Act does not apply to cases that were pending when it was enacted.

1. It is important, at the outset, to be clear about the nature of petitioners' constitutional claim in this case. Petitioners contend that the First Amendment places lim-

its on the power of the state to regulate—by statute or by common law—the activities of religious personnel engaged in counseling parishioners or selecting, assigning, and supervising priests. These functions, we contend, are inextricably linked with religious perspectives, and a jury can only judge their performance in a given case by (1) ignoring the religious context and forcing religious institutions and personnel to live by secular standards or (2) assessing the defendants' conduct in light of the defendants' own religious principles. As numerous lower courts have recognized in cases involving analogous claims of "clergy malpractice," *see* Pet. 11, *either* approach threatens an undue governmental intrusion into the religious realm.

The Colorado Supreme Court flatly rejected this argument, and did so without even examining the extent of any burden on religion.[1] It held that tort claims may be pursued against a diocese and its clergy as long as (1) they do not require the court to take sides in disputes over church doctrine, and (2) "neutral principles of law can be applied." Pet. App. 17a. And it reached this conclusion based on a line of cases culminating in *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990), *see* Pet. App. 13a-16a—the decision that Congress specifically addressed in RFRA.

It thus is utterly clear that, if the new statute had been applied in this case, the Colorado Supreme Court would have undertaken an entirely different analysis. First, the court would have had to determine whether respondent's tort claims had created burdens on the free exercise of religion. If it determined that they did, then it would

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[1] Respondent faults petitioners for not introducing evidence to prove a burden on their religious exercise. Br. in Opp. at 10-11. But the Colorado Supreme Court gave no indication that it was rejecting petitioners' constitutional argument because of a lack of evidence. Rather, as we discuss in the text, it found no basis for applying the First Amendment to the implementation of general laws.

have had to decide whether the State had a compelling interest justifying those burdens. *See* RFRA § 3 (Pet. App. 60a). In this analysis, it would have been irrelevant that the burdens could be characterized as the "incidental" effects of generally applicable, "neutral" tort doctrine.

Respondent attempts to avoid this conclusion, arguing that there was no need to reach the RFRA issue in this case because the conduct burdened here was "secular." In her view, the only conduct of religious institutions that qualifies for protection (statutory or constitutional) is conduct that is specifically mandated by a religious tenet. Everything else, she claims, is "secular" and therefore subject to *any* form of governmental interference or prohibition, because such regulation would not constitute a burden on religious exercise.

This argument is plainly wrong. There are, in fact, a myriad of ways in which the government can impose burdens on religious exercise, beyond simply prohibiting conduct required by a religious tenet. Thus, for example, if a state legislature were to bar persons with particular psychological profiles from becoming members of the clergy, or to regulate the supervisory relationship between bishops and priests, or to establish guidelines for the conduct of pastoral counseling sessions, the burdens on religious activity would be clear—and those regulations would be subject to scrutiny under the First Amendment even if a particular denomination could not point to conflicts with its specific teachings. *See generally* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right of Church Autonomy*, 81 Colum. L. Rev. 1373 (1981). The same is true here, where the determinations of the jury set standards with regard to the hiring and supervision of clergy and the counseling of parishioners.

Nor did the Colorado Supreme Court hold that the activities here were all "secular" in nature. The court did note that "[a]pplication of a secular standard to sec-

ular conduct that is tortious is not prohibited by the Constitution," Pet. App. 16a, but this statement had an entirely different meaning than that attributed to it by respondent. What the court did (in circular fashion) was to define "secular conduct" as any conduct falling within the scope of generally applicable "neutral principles" of law. In other words, in stating that "secular conduct" is subject to secular regulation, the court was merely rephrasing the holding of *Smith* that the First Amendment provides no defense against application of general laws, regardless of the religious context in which the conduct may occur. It is this reasoning, in turn, that must be rejected if RFRA applies in this case.

2. Respondent also errs in arguing that RFRA plainly is inapplicable to pending cases. In fact, there are strong arguments for applying RFRA to all pending cases, based on the statutory language and the recent *Landgraf* decision of this Court.

To begin with, respondent has not succeeded in explaining away the extraordinarily broad language of section 6 of RFRA, which states that "[t]his Act applies to *all* Federal and State law, *and the implementation of that law, whether statutory or otherwise*, and whether adopted before or after the enactment of this Act." Pet. App. 61a (emphasis added). This provision makes plain that RFRA applies both to statutory and to common law, as well as to anything that constitutes the "implementation" of such law. Respondent argues that laws are only "implemented" by administrative agencies. Br. in Opp. 17-18. In fact, however, it would be far more natural to conclude that a state court applying state law in a pending case is "implementing" state law every bit as much as an administrative agency is doing in promulgating or applying a regulation.[2] If so, of course, the statute would apply to pending cases.

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[2] Moreover, respondent's reading leaves open the question whether RFRA would apply to administrative adjudications that were pend-

Plain language providing for retroactivity fully rebuts the presumption against retroactive application of statutes, recognized recently in *Landgraf*. But even if the Act were read as ambiguous on this score, there would still be a substantial argument favoring its application in this case. By its very nature, RFRA is a statute that removes burdens imposed by government on religious activities. There is every reason, even in the absence of express congressional direction, to read this statute as requiring cessation of continued prosecution of pending court actions brought by state governments based on state laws that are now preempted. *See Landgraf*, 62 U.S.L.W. at 4264 & n.30 (discussing *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969)) (retroactivity is generally favored where a statutory change is aimed at protecting constitutional rights, where application of the new statute avoids a constitutional issue, or where the government is replacing a more restrictive rule with a more generous one).[3]

If that approach is accepted, the only remaining question is whether it makes sense to draw a distinction between pending cases brought by the government and tort cases like this one—merely because application of the statute here would affect the ability of a private party to recover tort damages. In the end, given the fact that recovery of damages in the future will be barred, it seems more reasonable to conclude that Congress intended the new standard to apply in all pending cases where burdens were being imposed on the free exercise of religion, regardless of whether the opposing party is the government or someone else.

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ing when the statute was passed. If so, it is difficult to see how there would be a different result in cases pending in court.

[3] Thus, for example, there is no reason to believe that Congress would have wanted states to be able to avoid meeting the RFRA compelling-interest standard in criminal prosecutions for sacramental use of peyote that were pending when the Act was passed.

At a minimum, there can be no doubt that there is a substantial argument in favor of application of RFRA in this case. What petitioners ask is the opportunity to have that issue decided where it should have been decided before: in the Colorado Supreme Court.

## CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the decision below, and remand this case for reconsideration in light of the Religious Freedom Restoration Act and the decision of this Court in *Landgraf v. U.S.I. Film Prods.*

Respectfully submitted,

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